Perhaps this is why the Commission has opted for a "voluntary" relocation program. The industry disruption caused by a mandatory relocation proposal would not just encompass the 861-866 MHz band, but also would include many licensees in the 851-866 MHz band, SMR and non-SMR alike. The disruption would be on a scale never before attempted or achieved by the Commission. See SMR Won's "Petition for Reconsideration" of the Third Report and Order. Rolling disruptions to multiple services were not anticipated by Congress. Domino auctions were not authorized by Congress, either.

Assuming for the moment that 800 MHz spectrum is to come from existing licensees who would win the geographic auction, there is only one operator who could fulfill that role, even in part - Nextel. No other licensee would have sufficient blocks of spectrum to relocate entities in most markets. Thus, if voluntary relocation is to be a reality, only one entity realistically could bid at auction - Nextel.

If a small business entity, with some or no frequencies, wins a 50-channel MTA auction, he must then relocate incumbent licensees. Who is the largest licensee? Nextel, in most instances, following its mergers with OneComm, Motorola, Dial Page, Questar, and others. If the non-Nextel MTA licensee must supply relocation spectrum, he must buy it on the local market or convince Nextel to sell those frequencies to him. With wide-area warehoused licenses and existing operations, Nextel could outlast

and defeat any MTA auction winner, simply by ignoring him and proceeding with its current business plan.

Thus, even under voluntary relocation, as presently proposed, one existing licensee is the probable winner in most markets, even if he does not bid in those markets. This includes major metropolitan areas where 800 MHz frequencies already are owned by Nextel,[115] or markets where Nextel would have substantial unconstructed license holdings following merger.

By failing to create or identify any Relocation Block, the Commission has created an auction in which only one player, whether under mandatory or voluntary relocation, eventually could win.[116]

E. Mandatory Relocation Proposals Similarly Are Flawed.

The Commission has asked whether some form of mandatory "intervention" by the Commission should take place if "voluntary relocation" fails.[117] The Commission has proposed a "voluntary" program for a period of years, followed by a "mandatory" period

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[115] The DOJ has refused in settlement to disturb Nextel's 800 MHz licenses in the major cities. See CIS at 17-18.

[116] Other bidders would have to add to their bid the cost of purchasing spectrum to relocate incumbents. Nextel would not, and could therefore bid higher at auction. Furthermore, it is not yet clear that all licensees would have to be "relocated", rather than squeezed to death by a combination of frequency warehousing and short spacing made possible by the current abuse of the Commission's rules and the Clayton Act.

[117] FNPRM at 22, ¶ 35.

of negotiation or arbitration.[118] Mandatory relocation leads to the same results. There are two kinds of "mandatory relocation" proposals in vogue. The first is truly mandatory, the second is best described as mandatory only to the relocatee.

Even the Commission's proposal is only mandatory on the Relocatee. If the geographic area licensee cannot "demonstrate the availability of fully comparable alternative frequencies,"[119] then relocation would not be required.

It has already been established that only Nextel has sufficient "fully comparable alternative frequencies" available to permit it to relocate incumbents.[120] None of SMR WON's members could relocate all other incumbents in an MTA market, or just about any other market, from licensed frequencies. In fact neither can Nextel, though it can come the closest. This is why the Commission has established this precondition - you must own a "comparable frequency" before you relocate.

Even putting aside the debate over "comparable frequencies" for a minute, the impact of this precondition would be to permit the geographic area licensee to pick and choose who he wants to

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[118] Id. at ¶ 36.

[119] Id.

[120] We surmise that some parties might suggest that "any" frequency in the 800 MHz band would substitute. It is laughable to expect that cellular licensees would enter an SMR lottery only to swap 10 MHz of individual frequencies from their cellular block for individual frequencies in the SMR block. While such a result is theoretically possible, it is almost beyond the realm of believability. No other General Category, Industrial, or business licensee would have sufficient spectrum to relocate all incumbent SMR operators in a market.

relocate. One of the larger independent SMR licensees has operated approximately 100-135 relocatable channels using EF Johnson equipment since the early 1980s when Motorola terminated its dealership in favor of itself. Another large operator in a different part of the state has approximately 50-80 relocatable channels. The auction winner for the much larger MTA would have an incentive to eliminate this strong market competitor before entering the market. By refusing to "find" 100-135 "fully comparable" channels outside the 861-866 band[121/], the auction winner would simply refuse to "relocate" that competitor.[122/] However, OneComm/Nextel has ringed this market with unconstructed licenses, and the operating licensee is unable presently, in 1994 and 1995, to expand its product market (available communications time) or geographic market through applying for new 800 MHz SMR frequencies. As the incumbent's customers grow and the incumbent is unable to provide expansion space[123/], the incumbent would lose customers and business reputation - good will starts to erode. Thus, by the time Nextel constructs a system to serve the market in 1996 or 1997, or later, it would face a weakened

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121/ Or perhaps even outside the "lower 80" channel SMR band

122/ The MTA auction winner might choose instead to relocate other competitors in other parts of the MTA, thereby further reducing the availability of "comparable" frequencies to "relocate" its biggest competitor in Idaho's most important market.

123/ At present digital equipment for expanding existing frequency capacity is not available from other manufacturers, and likely will not be available during this next critical two-year period.

competitor - one who cannot be relocated under the Commission's proposal, who must either go out of business or sell at liquidation prices to the surrounding market monopolist.

This result applies equally to SMR WON's larger small business members in Florida, Tennessee, Idaho, Minnesota, and elsewhere. In fact, the description can apply to any incumbent, large or small, who Nextel chooses to relocate last. Because the Commission has refused to require that all incumbents can be relocated, the Commission's "mandatory" relocation proposal encourages panic sales by first-come, first-served licensees seeking obtain "something" from the vague, unspecified, private and discretionary relocation "pool."

F. A Pre-Auction Relocation Block Must Be Established.

Truly mandatory relocation which would encourage auction participation and protect existing incumbents would require the Commission to establish a Relocation Block for this service prior to adopting or holding of any auction. This block would account not only for the relocation of existing SMR licensees, but also for displaced General Category and Intercategory Pool licensees. A Relocation Block of 200 channels should be assembled. This spectrum most likely could be assembled from existing unconstructed but "licensed" channels subject to 5-year extended construction timetables, or from the unconstructed General

Category pools where individual application mill speculators have been particularly active lately.[124/]

For example, no unconstructed license at any site should have licensed to it more than 50 channels. That is within the parameters of the 42-channel minimum needed to engage in frequency re-use.[125/] The current licensee would be permitted to pick the same 50 channels within a "block", and return the balance to the Relocation Pool. Similarly, unconstructed General Category channels which were not licensed to incumbent operators in a market by the date of these comments should be placed in these pools.[126/] Only after the Commission had established a pool of 200 channels in the Relocation Pool for each market, and determined that the available relocation incumbents in that

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[124/] This also has the added benefit of correcting the abuse of the Commission's licensing processes by preventing the anticompetitive aggregation of licenses, and putting teeth into the Commission's desire not to award licenses to speculators.

[125/] See Petition for Rulemaking, RM 7985 at pp. 7-9 (filed April 22, 1992).

[126/] Coordinated intercategory pool or general category channels provided the only frequency expansion opportunity for most small business SMR operators in 1994. To the extent an existing operator is utilizing those channels under management agreement or otherwise, and the channels were in operation on January 5, 1995, those operations should be permitted to continue, and incumbent operators in the market should be permitted to construct their licenses to expand existing service. However, substantial speculation occurred in 1993 and 1994 in the General Category band, with application mills licensing out-of-state speculative licensees with single-channel GX category licenses. See Exhibit J. Speculators who currently do not have operations in the market, would have their licenses modified to specify new frequencies. Such speculators could be provided 900 MHz frequencies, for example.

market pool did not exceed 200 channels[127], then it could proceed to auction in that market.

G. Premium for Relocation - The Geographic Competitive Equity Premium.

The Commission requested comment on whether relocation premiums should be awarded:

> We also seek comment on whether MTA licensees should be required to offer some form of premium over cost (e.g., additional channels or improved facilities) if they seek to invoke a mandatory relocation option.[128]

SMR WON does not support the concept that a premium should only be available if the MTA licensee chooses a "mandatory relocation option."[129] The relocation pool must be established prior to auction, so that all incumbent licensees can be relocated; only in this way will the Commission be fulfilling its duty to provide a fair and equitable distribution of service throughout the country.[130]

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[127] The larger the market, the more channels are needed for relocation in each market. As discussed below, the Geographic Competitive Equity Premium would promote competitive fairness, and approximate the fair market value of the spectrum being given up. However, MTA market will have more licensees per market who need to be relocated than BTA markets.

[128] FNPRM at 23, ¶ 36.

[129] This internally inconsistent phrase "mandatory relocation option," dramatically states the problem. Relocation is optional for the MTA winner, but mandatory if he chooses to impose it on the incumbent licensee. It begs the question of available spectrum for relocation.

[130] SMR WON's members for many years have been providing service in areas where cellular service has been delayed or inadequate.
(continued...)

Through extended consultation with its membership, SMR WON believes that the Commission must establish geographic competition in which the incumbent operator is permitted to compete on relocated frequencies throughout the auction winner's market. This best preserves competition, provides the SMR incumbent with fair market value for the bundle of property rights inherent in the transferred license (including the value in the hands of the new license holder) and ensures that existing customers will continue to obtain competitive service. This Geographic Competitive Equity Premium promotes competition, and preserves price competition in the market by maintaining strong competitors to costly cellular-like SMR service in a fair and stable regulatory environment. The Commission's present proposal, without a definable Relocation Pool, and with no ability for current operators to grow both the product and geographic market, has created instability and uncertainty to the public and the interested business community generally - customers and suppliers, operators and manufacturers.

Geographic Equity and Market Size. In studying this issue, SMR WON concluded a Geographic Competitive Equity Premium

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[130/](...continued)
The under-served areas do not have to be remote wildernesses. The Boise, ID. system is strong primarily because it fulfilled a need prior to the introduction of cellular service to that small city. The city has now grown, and the SMR licensee has with it, because it has provided reliable service at low cost to its customers. The proposed build-out of the same frequencies on MTA licensed areas will again ignore the nation's rural areas; See FNPRM at 29, ¶ 48. With the current inability of existing SMR licensees to expand, the nation's smaller metropolitan and rural markets will be under-served.

is not likely to work in MTA-sized markets. The MTA market simply bears no relation to any current patterns of SMR service.

SMR WON opposes MTA sized markets as too large for a number of reasons. First, it is virtually impossible for SMR WON's small business members to compete successfully in MTA geographic auctions, no matter the size of the frequency block being auctioned. Small businesses grossing $15 million or less simply would be out-bid in such large sized markets, even if the Commission established the Relocation Block and eliminated the single-company preferences for Nextel it has built into the current auction system.

Second, a Geographic Competitive Equity Premium would be difficult, if not impossible, to implement on MTA sized market blocks, because there would be too many incumbents in each market who would have to be relocated.

SMR WON then looked at BTA markets, and concluded they were too small for SMR service.

Then, at the suggestion of AMTA, SMR WON and its members studied Department of Commerce BEA market areas. SMR WON found that these BEA markets, intermediate in size between BTAs and MTAs, rather accurately reflected existing commuter patterns, which are of significant importance in providing SMR services. Even with enhanced or digital service, the primary business is local market business, and BEA markets recognize this. Another significant advantage is that such markets are government-

created, and thus carry no heavy copyright fees for use as do MTA and BTA markets.

These markets also appeared to work well for implementing the Geographic Competitive Equity Premium. There were not so many licensees in a market that implementation would present significant problems, assuming the Relocation Pool is established, and the resulting market competition would generally reflect actual markets and commuting patterns of importance to SMR.

H. Size of Auction Blocks.

Nothing in this section should be construed as assuming that SMR WON favors auctions. Under the Commission rules, commenters are encouraged to include in their initial comments all relevant issues, so that others have an opportunity to respond in reply comments. SMR WON discusses auction block size, and indeed, other auction issues, only in this context, and without conceding its position concerning the authority of the Commission to auction this licensed service.

SMR WON approached this issue very practically. Could small business operators expect to compete successfully in MTA auctions for 50 channels of 800 MHz spectrum? First, no small business participation is possible without a pre-established Relocation Block.[131/] Second, small business cannot compete effectively in

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[131/] See discussion at V.D., supra.

auctions for such a large geographic area. Third, the proposed block size is, for the most part, too large.

Assuming that the Commission created a competitive business environment in which incumbent operators could reasonably expect to compete, survive, maintain existing service to the public, and provide additional service to existing and new customers, what kind of auctions could small business SMR operators compete in an win? They can't compete against the financial power of large business, such as MCI, Nextel, or other cellular operators, including those which may have a 40 MHz spectrum cap limitation.[132/] They should not expect to be able to compete against Designated Entities. In PCS, the Commission created such a large definition of small business, and permitted such significant "passive investor" attribution rules to encourage designated entity participation,[133/] that legitimate, operating small business licensees such as SMR WON's members would be

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[132/] SMR WON has objected to the "aggregation maximum" for counting SMR spectrum toward this cap. See its Petition for Reconsideration of the Third Report and Order, Exhibit ___ hereto. Spectrum is spectrum; spectrum is valuable. If the Commission were truly implementing regulatory parity, it would count 1 MHz of spectrum in the lower 800 MHz band the same as 1 MHz of spectrum in the upper band, especially in light of its auction proposals. In addition, given the PCS divestiture rules which permit spectrum capped PCS licensees to divest following auction, it is reasonable for SMR WON to expect that all cellular licensees, both within and without a market, would be eligible to bid at auction, provided they divested, and provided a relocation pool of channels were established that would reasonably permit them to implement a successful bid.

[133/] Fifth Report & Order in PP Docket No. 93-253, FCC 94-178 (released July 15, 1994) reprinted at 59 Fed. Reg. 37,566 (July 22, 1994) ("Fifth Report & Order").

placed at an insurmountable disadvantage, were similar rules adopted here.

SMR WON proposes the following for Commission consideration. The following proposal is contingent on:

1. The adoption, by rule, of a sufficient Relocation Block to serve displaced SMR licensees and other 800 MHz licensees;

2. The partial relinquishment of frequencies to the Relocation Pool by those holding unconstructed licenses having in excess of 50 unconstructed frequencies per license, with tax certificate treatment for such relinquishment;[134/]

3. The re-management and elimination of short-spacing;

4. Requiring that all licensees operating on January 5, 1994, be relocated;

5. Establishing through a survey questionnaire of existing licensees that all operating licensees in a BEA market can in fact be relocated through the Relocation Pool; and

6. Establishment of the Geographic Competitive Equity Premium for spectrum on which incumbents are relocated.

Given these and other preconditions which may arise during the course of this rule making proceeding, SMR WON suggests that the Commission review the feasibility of the following auction of

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[134/] This could be accomplished, at least in part, voluntarily by licensees who would stand to gain from a clear spectrum block. Other licenses could be modified by rule to eliminate the extended construction waiver.

the 861-866 MHz band. All auctions would be for Department of Commerce BEA - sized markets:

1. Two 50 channel blocks auctioned on a BEA market basis.

2. Designated Entities. One block of 50 channels, auctioned in blocks of 15-15-15-5 channels, for small business and designated entities; auctioned on a BEA market basis.

3. Market Operator Set Aside. One block of 50 channels, auctioned in blocks of 15-15-15-5 channels in BEA markets. Eligibility would be limited to existing operators who were providing SMR service in the BEA market on June 20, 1994, the date of Nextel's original proposal to clear this spectrum. Nextel and its affiliates would be ineligible for this spectrum block, as would cellular operators.[135]

This proposal reasonably ensures implementation of Congress' requirement that the Commission "ensure" the participation by small business, something that has not yet been achieved with respect to any reasonable definition of small business entity.[136]

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[135] See, e.g., In the Matter of Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order, 8 FCC Rcd. 7162 at 7165-7167 (released July 23, 1993) (setting aside spectrum for use separately by existing licensees, designated entities and small businesses and set up in 50 kHz channel blocks to be auctioned in both 50 kHz whole blocks and subdivided blocks).

[136] See 47 U.S.C. § 309 (j)(4)(D). As previously, discussed, the definition of "small business" for purpose of the PCS auction is so large as to constitute "smaller large businesses". In the Commission's Fifth Report and Order, the Commission defined a small business designated entity as "any company that, together with attributable investors and affiliates, has average gross revenues for the three preceding years not in excess of $40 million". "Consortium of small businesses" was defined as a "conglomerate organization formed as a joint venture among

(continued...)

I. Existing Wide Area Applications.

SMR WON is not opposed to the implementation of pending wide area proposals filed on or prior to August 10, 1994, the effective date of the freeze for the acceptance of new applications, where those proposals seek to reuse presently operating frequencies within the scope of the existing footprint. SMR WON is opposed to the grant of additional extended implementation periods for new construction under any other circumstances, since such extensions would further enhance warehoused frequency concentration.

J. The Commission Should Utilize Tax Certificates as a Relocation Incentive for Displaced Incumbent SMR Licensees.

The Commission has established precedent for utilizing the tax code, in connection with its authority, in order to further important policy goals. One of the ways in which the Commission has authorized the use of tax certificates has been as a method of easing the financial burden that licensees encounter when forced to divest themselves of property as a result of the Commission's furtherance of a broad public policy agenda.

Section 1071 of the tax code states, in relevant part:

> [i]f the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in a policy of, or the

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[136] (...continued)
mutually-independent business firms, each of which individually satisfies the definition of small business."

> adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033.

The Commission first applied its tax certificate authority to broadcast radio and television licensees in 1978 for the purpose of furthering the Commission's goal of increasing minority participation in the broadcast arena [137]. Subsequently, the Commission amended its policies to further encourage minority participation while noting:

> [Section 1071] confers broad jurisdictional powers upon the Commission, normally reserved to the Treasury, to issue tax certificates. The Commission's grant of a tax certificate is solely dependent upon its finding that a sale or exchange of property is "necessary or appropriate" to effectuate the adoption of a new policy or a change in an existing policy relating to the ownership and control of broadcasting properties. The Commission establishes policies in the first instance and makes the determination as to whether a particular transaction furthers a specific policy. Minority Ownership in Broadcasting, 92 F.C.C.2d 849 (1982.)

The Commission later interpreted its tax certificate authority under the tax code to encompass the provision of tax certificates to cable facilities, noting the equally important goal of increasing minority representation in the cable arena.[138] Additionally, the Commission has stated that prior

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[137] Statement of Policy on Minority Ownership of Broadcasting Facilities, "1978 Policy Statement", 68 F.C.C.2d 979 (1978).

[138] Policy Statement on Minority Ownership of Cable Television Facilities, 52 R.R.2d 1469 (Pike & Fischer) (1982.)

Commission precedent "favors an expansive construction of Section 1071 to authorize the issuance of tax certificates in connection with a sale or exchange compelled by the Commission's policies even in instances where those policies do not bear directly upon broadcasting."[139/]

In 1985, Telocator Network of America requested that the Commission extend its tax certificate policy authority to apply to the exchange or sale of non-wireline cellular partnership interests. The Commission granted the request and noted that in "light of the dramatic changes in the telecommunications marketplace" since the enactment of Section 1071, taking in consideration the legislative history of Section 1071 and prior Commission precedent, the phrase "radio broadcasting station" is merely:

> illustrative of the more general congressional intent to facilitate the effectuation of the Commission's policies rather than restrictive, and the scope of the phrase is properly construed as expanding with the extension of the Commission's pro-competitive policies.[140/]

The Commission has also used tax certificates in the context of relocation. Recently, drawing on its broad authority under Section 1071, the Commission justified the use of tax certificates to remove the financial disincentive facing incumbent microwave licensees asked to relocate in order to

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[139/] Telocator Network of America, 58 R.R.2d 1443, 1450 (Pike & Fischer) (1985.)

[140/] Telocator Network of America, 58 R.R.2d 1443, 1450 (Pike & Fischer) (1985.)

accommodate emerging technology providers during the voluntary relocation period:

> We believe that tax certificates would further our policy of encouraging voluntary agreements to relocate fixed microwave facilities to other bands or other media during the fixed two year period. They [the certificates] would remove the possibility of any financial disincentive to relocate if a 2 GHz fixed user may be deemed to have received a capital gain under the tax laws due to new facilities acquired to implement the relocation.[141].

Similarly, the relocation of incumbent SMR licensees in order to provide spectrum for wide-area SMR systems is no less important to furthering the Commission's and Congress' goal of enhancing the competitive position of SMR in the domestic mobile services marketplace, as well as augmenting our competitive potential in the international marketplace. Accordingly, tax certificates should be provided as an incentive to all incumbent SMR licensees who are forced to relocate, regardless of whether the Commission adopts a voluntary or mandatory relocation program. Such action will ease the economic burden that the incumbent licensee will experience as a result of the relocation, and will provide an additional incentive for smoother negotiations between the incumbent licensee and the MTA licensee. Tax Certificates would also be available for the fair market value of any licensed but unconstructed frequencies donated or divested to the relocation pool.

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[141] See, Third Report and Order, 8 F.C.C. Rcd. 6589, 6606 (1993.)

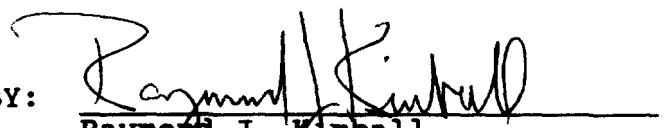
VI. CONCLUSION

These comments represent a broad consensus of independent SMR operators in over 30 states. These comments have been the result of substantial discussions with other associations representing different constituencies of the SMR or General Category bands. The Commission lacks the authority to impose market restructuring auctions, and take from licensees their business property values affiliated with but separate from the license, including the value of the proceeds of sale to a market aggregator. The Commission needs to step back, re-evaluate its proposal in light of its limited regulatory authority, and propose a new, more fair and equitable plan if it seeks further to disrupt existing public service in favor of wide-area licensing. Additional interim relief should be implemented this year to protect the growth of the SMR industry in smaller metropolitan and rural markets where the effects of frequency warehousing are the most severe. The Commission has ample authority to modify or condition as yet unconstructed licenses or

ungranted applications to permit continued growth of this Communications sector at the current 15%-25% annual growth rates.

Respectfully submitted,

SMR WON

BY: 

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Dated: January 5, 1995

EXHIBIT A

List of States Where
SMR WON Members Operate

LIST OF STATES WHERE SMR WON MEMBERS OPERATE

Alabama
Arkansas
California
Colorado
Florida
Georgia
Idaho
Illinois
Indiana
Iowa
Kansas
Louisiana
Maine
Maryland
Michigan
Minnesota
Mississippi
Missouri
Nevada
New York
North Carolina
Ohio
Oklahoma
Oregon
Pennsylvania
South Carolina
South Dakota
Tennessee
Texas
Washington
West Virginia
Wisconsin

EXHIBIT B

Petition for Reconsideration
Filed December 21, 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Sections 3(n) and 332 of the Communications Act	)	GN. Docket No. 93-252
Regulatory Treatment of Mobile Services	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144

TO: The Commission

PETITION FOR PARTIAL RECONSIDERATION

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DATED: December 21, 1994

TABLE OF CONTENTS

SUMMARY OF ARGUMENT

The Commission lacks the statutory authority to auction geographic "markets" without significant electromagnetic spectrum or to relocate an established service. The Commission has abused its discretion in adopting an "expansive view" of competition which includes all CMRS services. Such actions ignore the potential impact on the 800 MHz SMR market and would greatly diminish competition to the benefit of a single, large competitor. The Commission's failure to fully attribute all 800 MHz spectrum serves only to exacerbate the continuing monopolization of the market.

Moreover, the Commission's actions ignore the circumstances facing the present 800 MHz SMR market. With virtually all spectrum allocated in every market in the country, nothing remains to auction. Further, as the Justice Department recently has demonstrated, the SMR market is a separate product market which is not a substitute for cellular and ESMR services. In sum, the Commission's orders are not the result of a reasoned analysis and must be reconsidered.